United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7175

United States Court of Appeals

FOR THE SECOND CIRCUIT

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES AVIS RENT-A-CAR SYSTEM, INC., SALVATORE GIUFFREDA, BERNARD NELSON, CHARLES NAPOLITANO AND STUART B. STILLMAN

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 593-9000
Attorneys for Defendants-Appellees Avis Rent-A-Car System, Inc., Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart B. Stillman

MICHAEL A. CARDOZO
STEPHEN E. TISMAN
MINNA J. KOTKIN
Of Counsel

UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

-against- : Docket Number 77-7175

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

- X

BRIEF FOR DEFENDANTS-APPELLEES AVIS RENT-A-CAR SYSTEM, INC., SALVATORE GIUFFREDA, BERNARD NELSON, CHARLES NAPOLITANO AND STUART B. STILLMAN

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Where plaintiffs' action under 42 U.S.C. §1983 and the Constitution is commenced more than three years after the last event allegedly causing them harm, does the federal fraudulent concealment doctrine extend the three year limitations period where:

(a) plaintiffs have alleged no affirmative acts of concealment by defendants; and

(b) plaintiffs knew of their alleged injury prior to the expiration of the limitations period, and knew or had the means to learn the identities of the alleged wrongdoers?

The court below did not find it necessary to answer this question.

2. Where an otherwise time-barred action brought under 42 U.S.C. §1983 and the Constitution is not commenced within two years of discovery of the claim which allegedly had been fraudulently concealed, is the action time-barred under N.Y.C.P.L.R. §203(f)?

The court below answered this question in the affirmative.

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment (54a)* of the United States District Court for the Eastern District of New York (Pratt, J.) granting the motions (17a-26a) of defendants-appellees ("defendants") to dismiss the complaint (2a) as time-barred. The complaint, filed by plaintiffs-appellants ("plaintiffs") on April 12, 1976, sought damages under the

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* References to the Joint Appendix are cited " ___a."

Constitution and 42 U.S.C. §1983* for acts committed in 1971 and 1972, allegedly pursuant to a conspiracy among the defendants, who include Avis Rent-A-Car System, Inc. ("Avis"), certain of Avis' present and former employees**, International Telephone & Telegraph Corporation ("IT&T"), former Queens County District Attorney Thomas J. Mackell, and certain former employees in the Queens County District Attorney's office.***

The Complaint

Plaintiff G. Thomas Cestaro ("Cestaro"), the principal owner, officer and operator of plaintiff Sta-Brite Auto Painting Corporation ("Sta-Brite") (3a), plaintiff Catherine Cestaro, his wife and the corporate secretary of Sta-Brite (3a), Sta-Brite, and plaintiff Richard Marchetti ("Marchetti"), a former employee of Avis (3a, 8a), allege that between 1970 and

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* Plaintiffs have stipulated to the dismissal of Count III of the complaint (15a) as against all of the defendants, and to the dismissal of Count IV (15a-16a) as against Avis, International Telephone & Telegraph Corporation, and the individual present and former Avis employees named as defendants. (35a)

In addition, plaintiffs have stipulated to the dismissal of the entire complaint as against the City of New York. (34a)

** Salvatore Giuffreda, Bernard Nelson, Charles Napolitano and Stuart B. Stillman (hereinafter, together with Avis, "the Avis defendants").

John Savage, alleged in the complaint to be "an assistant vice president of Avis" (5a) was not served and is not a party to this appeal. (52a)

*** James D. Robertson, Frederick J. Ludwig, Joseph N. Monty and David J. McKeon (hereinafter, together with Thomas J. Mackell, "the Mackell defendants").

1972 defendants conspired to bring about plaintiffs' investigation, arrest and prosecution for larceny, attempted larceny, falsifying business records and conspiracy. (2a-16a) The complaint, whose allegations are described in detail in the opinion below (37a-44a), can be summarized as follows.

Prior to plaintiffs' arrest, Sta-Brite had repaired cars for Avis, and Marchetti, an Avis employee, was responsible for reviewing and approving cost estimates for repair work done by Sta-Brite. (3a) In 1970 or early 1971 Avis "concluded that criminal proceedings should be instituted against some or all of plaintiffs for allegedly padding bills ... and for allegedly not having made all the repairs claimed to have been performed." (6a)

Avis complained to the office of the Queens County District Attorney (6a) which then conducted an investigation. On April 26, 1971, a grand jury subpoena was served on Sta-Brite and Cestaro (7a) pursuant to which representatives of Avis and the Queens County District Attorney's office allegedly improperly confiscated Avis vehicles in Sta-Brite's possession. (7a-8a) On April 27, 1971, Marchetti was suspended by Avis without pay and subsequently was discharged. (8a)

An indictment was handed down by a grand jury and on June 8, 1971, the individual plaintiffs were arrested. (9a) On the same day a press release describing the indictment and arrest was issued. (9a-10a)

Plaintiff's trial commenced on June 8, 1972. (10a) The next day plaintiff Sta-Brite pleaded guilty to one count of grand larceny and was sentenced to pay a fine of $2500. The remaining criminal charges against the plaintiffs were dismissed, and releases were given to Avis and the Queens County District Attorney's office by the individual plaintiffs. (10a-11a) Sta-Brite's 1972 guilty plea has never been vacated.

Plaintiffs claim that the criminal investigation of the Avis charges against the plaintiffs, the presentment of the case to the grand jury, the improper use of a grand jury subpoena, the improper issuance of an over-broad press release, the coercion of a guilty plea by the corporation, and the execution of releases by the individual plaintiffs were all effected pursuant to an alleged conspiracy among the defendants. Each of these acts took place prior to June 10, 1972. (9a-11a)

The complaint further alleges that the existence of this conspiracy was "concealed from plaintiffs" who "did not learn of the existence of this conspiracy" until "public hearings held by the New York State Joint Legislative Committee on Crime on May 3 and October 11, 1973 and until the trial of defendant Monty in February and March 1974." (12a-13a)

In September 1973 and October 1973 Cestaro was allegedly offered a payment on behalf of Avis "if the plaintiffs would have the [New York State Joint Legislative Committee on Crime] call off its investigation." (13a)

This action was commenced by the filing of the complaint on April 12, 1976, five years after plaintiffs were arrested and their property seized; four years and ten months after they were arrested and after the issuance of the allegedly improper press release; three years and ten months after the guilty plea of Sta-Brite, the execution of releases by the individual plaintiffs, and the dismissal of the remaining charges against the plaintiffs; and more than two years after a legislative hearing, by which time, according to the complaint, plaintiffs had learned of the alleged conspiracy.

The Decision Below

In a scholarly seventeen page opinion, Judge Pratt reviewed the facts alleged in the complaint and the affidavits submitted by plaintiffs, and held the complaint time-barred. (37a-53a)

Noting that "[v]irtually all the events described in the complaint" occurred more than three years prior to the institution of suit (45a), and that "[n]ormally, 'the applicable statute of limitations in a federal civil rights

case brought in New York* is the three years provided by N.Y.C.P.L.R. §214(2) -- liability based on a statute,'" the Court proceeded to consider and reject three arguments offered by plaintiffs "in an attempt to save their action." (45a)

The first of these grounds, not pressed by plaintiffs on this appeal, is that certain alleged unsuccessful attempts to bribe plaintiffs in September and October 1973 extended the commencement of the limitations period to that date. Since the last act alleged in the complaint to have actually injured plaintiffs occurred on June 9, 1972, when Sta-Brite entered its guilty plea and releases were signed, Judge Pratt held the unsuccessful bribe attempts, even if true, to be of "no significance ... since none is alleged to have caused any plaintiff actual injury." (45a-46a)

The second ground advanced below, also not pressed on this appeal, is that defendants are estopped from asserting the statute of limitations. Judge Pratt held that plaintiffs' failure to "claim that defendants misled them as to either the relevant statutory requirements or the need to comply with them" was fatal to this defense. Alternatively, the court held that since plaintiffs did not commence the action for more than two years after they "were fully aware

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* The Court applied the same statute of limitations to plaintiffs' claims under the Constitution. (44a)

of the nature of the conduct which they now ascribe to the defendants," they were barred from raising the equitable doctrine of estoppel to avoid the statute of limitations. (46a)

The third ground, and the one at issue in this Court, is that the operation of the federal fraudulent concealment doctrine extended the limitations period to May 1976 (one month after this action had been commenced), three years after the date of the legislative hearing at which plaintiffs allegedly first learned of their civil rights claims against defendants.

In response, defendants argued, as they do here: (a) the fraudulent concealment doctrine was inapplicable because plaintiffs had alleged no affirmative acts of concealment by defendants; (b) plaintiffs could not avail themselves of the doctrine because they had not been diligent in obtaining the facts allegedly concealed from them; and (c) even if the fraudulent concealment doctrine was applicable, the failure of plaintiffs to commence their action within two years of discovery of the "concealed" facts made the suit untimely under N.Y.C.P.L.R. §203(f). Holding this third argument dispositive, Judge Pratt did not pass upon the other two. (47a)

Reviewing the legislative history and relevant commentary regarding N.Y.C.P.L.R. §203(f), the District Court found that it represented "a clear legislative policy that

for any New York action where the time to sue is extended because of failure to discover the wrong, the maximum extension should be two years." (48a) He rejected plaintiffs' contention that the applicability of §203(f) was limited under New York law to fraud actions, or to actions where, by statute, the time for commencement of a lawsuit runs from "discovery." (49a-50a) The court concluded that, while "the federal concealment doctrine tolls the limitation period until 'discovery' . . ., [o]nce the facts are discovered . . . New York law determines the length of the applicable period." (50a) That period, he held, was determined under §203(f): either "two years from 'discovery' or three years from injury, whichever is longer." (50a-51a) Applying this statute of limitations, the court held plaintiffs' claims time-barred, and dismissed the complaint. (52a)

ARGUMENT

POINT I

THE FEDERAL FRAUDULENT CONCEALMENT DOCTRINE IS INAPPLICABLE TO THE CASE AT BAR

Plaintiffs do not dispute that civil rights actions brought in New York federal courts must normally be commenced within three years, and that the acts they complain of occurred no later than three years and ten months before this action was commenced. Plaintiffs' entire argument is that application of the fraudulent concealment doctrine renders their action timely. As we show below, however, the fraudulent concealment doctrine is inapplicable to the facts alleged in the complaint (Point I). Moreover, as Judge Pratt held, even if the doctrine is applicable, N.Y.C.P.L.R. §203(f), requiring actions to be commenced within two years of discovery, renders this action time-barred (Point II).

The concealment doctrine was fashioned by the courts to prevent a wrongdoer from escaping liability to his victim by concealing the victim's federal cause of action until after the limitations period expired. Holmberg v. Armbrecht, 327 U.S. 392, 396-97 (1946). Even where the cause of action was concealed, however, the victim must have been diligent in attempting to learn of the existence of facts which would have identified the "concealed" cause of action in order to invoke the doctrine. Thus, the fraudulent concealment doctrine operates to ensure that a person who diligently

seeks to discover and assert his federal rights has the opportunity to do so after learning of the existence of his federal claim.

In City of Detroit v. Grinnell Corp., 495 F.2d 448, 460 (2d Cir. 1974), this Court enumerated the two essential elements necessary for a finding of fraudulent concealment:

> "In order to establish fraudulent concealment, a claimant must show: (1) that defendants concealed the basic facts that would reveal the existence of their [illegal] behavior, and (2) that plaintiffs were ignorant of those facts through no fault of their own."

A search of the record reveals that plaintiffs have failed to establish either element.

Plaintiffs Have Failed To Allege Affirmative Acts Of Concealment By Defendants

In order to avail themselves of the concealment doctrine plaintiffs must make an affirmative showing of acts of concealment by the defendants. Wood v. Carpenter, 101 U.S. 135, 143 (1879); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 393-95 (6th Cir. 1975); Verace v. New York Stock Exchange, Inc., [1976-77] CCH Fed. Sec. L. Rep. ¶95,735 at 90,577 (S.D.N.Y. 1976). It is insufficient for them simply to allege that they lacked knowledge of some facts which would have aided them in prosecuting their action: "Mere ignorance

of evidence on which to establish a claim is not enough [to establish fraudulent concealment]." Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 87 (2d Cir.), cert. denied, 368 U.S. 821 (1961). While plaintiffs' brief lists various "facts" of which they allegedly were unaware until legislative hearings were held in May and October of 1973 (Appellants' brief at 17-18), neither the complaint, plaintiffs' affidavits, nor their brief asserts that defendants concealed those facts from plaintiffs. This is fatal to their attempt to rely on the fraudulent concealment doctrine.

In lieu of this essential allegation, plaintiffs argue (Appellants' brief at 17, 20) that the facts were "self-concealing." They suggest that the statement of the alleged facts in itself is sufficient to show fraudulent concealment. In support of this view they rely on the following language from Baker v. F & F Investment, 420 F.2d 1191, 1199 (7th Cir.), cert. denied sub nom. Universal Builders, Inc. v. Clark, 400 U.S. 821 (1970): "Where . . . the wrong is self-concealing, little need be added in order to justify tolling the statute." (Appellants' brief at 16-17). Omitted from plaintiffs' quotation from Baker, however, is the following language after the word "where" in the quoted passage: "as in the case of many conspiracies in violation of the federal antitrust laws." (emphasis added)

While plaintiffs would have this Court label the

facts listed at pages 17 and 18 of their brief "self-concealing," the Baker court spoke of self-concealing wrongs. Thus, in the antitrust context, where a conspiracy is an actionable wrong* which gives to the plaintiff a federal claim, and where a plaintiff may not have any indication for some time that he is the victim of anticompetitive practices, it makes sense to speak of self-concealing wrongs.

In the case at bar, however, as in other actions where the gravamen of the claim is a specific act which causes harm, the concept of "self-concealing facts" is meaningless. See Gaito v. Strauss, 249 F. Supp. 923, 933 n.22 (W.D. Pa.), aff'd, 368 F.2d 787 (3d Cir. 1966), cert. denied, 386 U.S. 977 (1967) ("[§1983] is concerned with actual deprivations of constitutional rights and it is wholly immaterial whether or not such deprivations were effectuated pursuant to a conspiracy.")

Followed to its logical conclusion, plaintiffs' theory of "self-concealing facts" would remove concealment as an element of the fraudulent concealment doctrine, and would substitute in its place mere ignorance of evidence by the plaintiff, coupled with silence or inaction by the defendant. To so hold would be to extend indefinitely the statute of limitations for any federal claim where the wrongdoer does not confess his misdeed, an act which will rarely

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* See Sherman Act, 15 U.S.C. §1.

occur. This result was never intended, and has no basis in law. Cf. Grunewald v. United States, 353 U.S. 391, 401-04 (1957), where the Court refused to find that acts taken by conspirators after the conspiracy had achieved its purpose extended the statute of limitations to the date of the acts of concealment, since to do so would "wipe out the statute of limitations in conspiracy cases." 353 U.S. at 402.

Moreover, the Baker court actually rejected the concept of self-concealing wrongs in the civil rights context. Instead, the court, addressing itself to the Civil Rights Act claim before it, continued the above quoted passage -- conveniently omitted from plaintiffs' brief -- as follows:

> "In the present case, however, we are persuaded that . . .'[m]ere ignorance of evidence on which to establish a claim is not enough. . . .' Here there is no indication in the complaints that defendants concealed from plaintiffs or that plaintiffs actually lacked knowledge of the facts disclosing the discriminatory sales practices upon which this case rests. There is no allegation that defendants attempted to create or perpetuate an erroneous impression in the minds of the plaintiffs that the homes were being sold to them at the same price, on the same terms, and under the same conditions as they would be sold to whites." 420 F.2d at 1199 (emphasis added)

Thus, the Baker court specifically looked for attempts by the defendants actively to conceal, or to create a false impression; mere silence or inactivity on the part of de-

fendants did not convert undisclosed evidentiary facts into "self-concealing wrongs."

Here, as in Baker, plaintiffs were aware of virtually all the "wrongs" alleged in the complaint at the times they were perpetrated and, in any event, no later than the date of Sta-Brite's guilty plea (June 9, 1972), almost four years before this action was commenced. The fact of an improper arrest (9a), improper publicity (9a-10a), and a coerced guilty plea (10a-11a)* were all known to plaintiffs at or about the time they took place. Defendants did nothing to conceal these facts from plaintiffs.

Here, as in Baker, there is no allegation that defendants concealed anything, nor is there any allegation that defendants attempted to perpetrate an erroneous impression of the facts which were known to plaintiffs. Since plaintiffs have failed to allege an element which is a prerequisite to the application of the federal fraudulent concealment doctrine, they cannot invoke it to save their time-barred claims.

Plaintiffs' Ignorance Of The Facts
Is Due To Their Lack Of Diligence

Plaintiffs have also failed to satisfy the second requirement established by this Court in Grinnell as a predi-

* That plaintiffs had actual knowledge of sufficient facts to impose on them the duty to determine the existence of their causes of action is discussed infra.

cate to invoking the fraudulent concealment doctrine: the fraudulent concealment doctrine only applies where "plaintiffs were ignorant of [the] facts through no fault of their own." 495 F.2d at 460.

While plaintiffs may or may not have known of the existence of the alleged conspiracy involving the Avis defendants on June 8, 1971 (the date of their arrest), they certainly knew whether undue force was used in the arrest. If the Queens District Attorney's office issued an improper and false press release on June 8, 1971 (9a-10a), its falsity should have been apparent to the plaintiffs on that date. And if plaintiff Sta-Brite was, as the complaint alleges, "entirely innocent of the charges" (9a), it certainly knew that by the time it pleaded guilty on June 9, 1972. In short, if plaintiffs have a cause of action for damages, all of the facts necessary to frame a pleading with respect to their arrest and the press release, were known to them on or about June 9, 1971, and with respect to the guilty plea, on June 9, 1972.

Now, in an action brought some 22 months after the section 1983 statute of limitations expired on the events of June 9, 1971, and ten months after the statute expired on the events of June 9, 1972, plaintiffs seek to resurrect their claims with respect to those events by claiming they were part of a conspiracy, and that the existence of the conspiracy was unknown in 1971 and 1972.

An almost identical contention was rejected by the Court of Appeals in Fitzgerald v. Seamans, No. 75-1032 (D.C. Cir., Feb. 23, 1977) (Leventhal, J.). There, the Court affirmed the dismissal on statute of limitations grounds of a claim by a former employee of the Defense Department against officials of the Air Force, alleging a conspiracy to deprive plaintiff of his employment with the Air Force, in violation of his rights under the Constitution, 42 U.S.C. §§1985 and 1986, and the common law. (Slip Op. at 2, 10) Plaintiff claimed that he had been discharged, under the pretext of a "reduction in force, economy reorganization," in retaliation for his testimony before a congressional committee. (Slip Op. at 2-3) Citing Holmberg v. Armbrecht, supra, Fitzgerald claimed that the concealment doctrine lifted the bar of the three-year District of Columbia statute of limitations, because he was unaware of the existence of the alleged conspiracy, or the identities of all of its members, until less than three years before commencing suit. (Slip Op. at 4, 17)

The Court held the concealment doctrine inapplicable because plaintiff had knowledge of sufficient facts during the initial limitations period to sue some of the Air Force defendants. Judge Leventhal wrote:

> "Appellant claims not to have known at the time of [his termination hearing] of the conspiracy against him, and to have only later learned the identities of some of the conspirators and the meetings held concerning him . . . .

> What matters is that appellant knew of facts and actions pointing toward retaliation by the Air Force for his congressional testimony.
>
> Our affirmance of the summary judgment in favor of the defendants includes all of the Air Force officials including [one] whose identity . . . was not known to appellant three years before the complaint was filed. Appellant had . . . at least constructive knowledge of grounds for the late lodged suit . . . . The matter would stand differently if appellant had proceeded with diligence within the 3-year period by suing those conspirators known to him at the time, and later sought to add other participants whose identity he learned in the course of that suit." (Slip Op. at 17-18) (emphasis added)

Since Fitzgerald "had facts in hand sufficient to put him on notice of the conspiracy by the Air Force appellees . . . [and] the conduct by some Air Force officials which is now asserted as the basis for the law suit . . ." (Slip Op. at 16-17) (footnote omitted), the Court refused to apply the fraudulent concealment doctrine with respect to the Air Force defendants.

Similarly, plaintiffs here had sufficient knowledge prior to June 1975, when the three year limitations period expired, to link some or all of the defendants to plaintiffs' alleged injury. According to the complaint, they knew that Avis employees participated in the personal service of the subpoena (7a), in the confiscation of automobiles (7a) and business records (8a), and in the negotiations leading to the

guilty plea. (10a) They knew that an Avis employee signed a receipt for the automobiles on Police Department stationery (7a-8a), and that the automobiles were delivered to Avis rather than to the Police Department pound. (8a) They "received some indication prior to the hearings" that Chief Investigator Monty, who supervised the investigation which confirmed Avis' allegedly false charges against the plaintiffs (9a-10a), had received free use of Avis cars. (28a) Even without knowledge of the Avis defendants' participation, plaintiffs knew the Mackell defendants, or at least some of them, were responsible for their allegedly improper arrest and prosecution.

At the very least, plaintiffs were put on notice of facts which required further investigation; and this was sufficient to start the running of the limitations period. In Mount v. Book-of-the-Month Club, Inc., No. 76-7458 (2d Cir., May 19, 1977), this Court held that an action for copyright infringement was time-barred despite plaintiff's claim that he did not learn that the infringer had access to his book, until after the limitations period had run. This Court ruled:

> "But plaintiff knew in or about January 1956 of the publication of [the infringing] pamphlet; he could tell if he had a potential infringement claim by comparing the two works and noting the similarities; if he thought actual access by [the infringer] before January 1956 had to be proved, he could have found out through discovery whether and how [the infringer] had seen the [plaintiff's] book. That type of know-

> ledge, available to plaintiff in 1956, was enough to start limitations running at that time . . . ." (Slip Op. at 3617) (emphasis added)

Just as in Mount, plaintiffs here knew if they had been injured, and they could have commenced an action for damages which would have disclosed the "concealed" fact of the alleged conspiracy. Instead, they elected to do nothing.

As this Court held in Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 410 (2d Cir. 1975):

> "[T]he time from which the statute of limitations begins to run is not the time at which a plaintiff becomes aware of all of the various aspects of the alleged fraud, but rather the statute runs from the time at which plaintiff should have discovered the general fraudulent scheme. '[T]he statutory period . . . [does] not await appellant's leisurely discovery of the full details of the alleged scheme.' Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970)."

Plaintiffs should not be permitted to revive their dead claims by hollow allegations of lack of knowledge. Their failure to act diligently precludes the application of the fraudulent concealment doctrine to this case.

POINT II

THE COURT BELOW CORRECTLY HELD THAT N.Y.C.P.L.R. §203(f) BARS THIS ACTION

The court below assumed the applicability of the fraudulent concealment doctrine, but ruled that plaintiffs' claims under 42 U.S.C. §1983 and the Constitution were barred by the statute of limitations contained in N.Y.C.P.L.R. §203(f):

> "[W]here the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered . . . the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer."

Since §1983 contains no statute of limitations, the state statute which this Court has generally held to be applicable in federal c il rights cases brought in New York is N.Y.C.P.L.R. §214(2), which establishes a three year limitations period in actions to assert liability based on a statute. Meyer v. Frank, 550 F.2d 726, 728 (2d Cir. 1977); Kaiser v. Cahn, 510 F.2d 282, 284 (2d Cir. 1974); Romer v. Leary, 425 F.2d 186 (2d Cir. 1970); see Ervin v. Lanier, 404 F. Supp. 15, 20 (E.D.N.Y. 1975).

Judge Pratt, however, found that since the fraudulent concealment doctrine was interposed to toll the statute of limitations until discovery of facts, §203(f) -- which

expressly applies where discovery triggers the running of the statute -- is the applicable state statute of limitations to be borrowed. Thus, when plaintiffs' claim accrued on June 9, 1972, the date of the guilty plea, they were required to bring their action within three years of that date (June 9, 1975), or within two years of the alleged "discovery" in May 1973 (May 1975).*

As A Matter Of New York Law
This Action Had To Be Commenced
Within Two Years Of Discovery

Faced with a two year state statute of limitations which, on its face, encompasses situations such as the application of the federal concealment doctrine, plaintiffs argued below that, as a matter of New York law, §203(f) applied only in fraud actions.**

Plaintiffs apparently have abandoned that position and now assert (without citation of any authority) that §203(f) cannot be the applicable statute of limitations since, under New York law, it only applies where a New York statute pro-

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* As the court below noted, plaintiffs conceded that the concealment doctrine would not toll the statute of limitations past May 1973. (52a)

** New York's fraud statute of limitations, N.Y.C.P.L.R. §213(8), provides that such actions must be brought within six years of the time when the plaintiff discovered, or with reasonable diligence could have discovered, the fraud.

Of course, had the New York Legislature intended the two-year period to be used only in fraud actions, the obvious course would have been an amendment to §213(8).

vides for tolling of the limitations period until discovery. (Appellants' brief at 22-25).

This attempt to circumscribe the application of §203(f) was anticipated and rejected by Judge Pratt: "the language of §203(f) is not confined to fraud actions, or even to the larger category of actions where a statute provides that time runs from 'discovery.'" (49a)

The general applicability of §203(f) is apparent on the face of the statute and has been expressly recognized both by the commentators and the courts. Professor McLaughlin, in his practice commentary to the section, notes that §203(f) applies whenever a statute of limitations is tolled pending discovery. He suggests, for example, that there is no reason why the section should not be applied to actions for divorce based on adultery. McLaughlin, Practice Commentary, McKinney's Consolidated Laws of New York, Book 7B at 125-27. See also 10th Annual Report of the Judicial Conference of the State of New York 105 (1965) ("CPLR §203(f) was designed to have general applicability to all discovery cases."); McLaughlin, New York Practice, 21 Syr. L. Rev. 709, 716 (1969) ("[CPLR §203(f)] appears to be of general applicability".)

The opinions of the commentators have been confirmed by the New York courts, which have utilized §203(f) both in actions other than for fraud, and in actions where tolling until discovery is not mandated by statute. In Howard v.

Murray, 46 App. Div. 2d 880 (1st Dep't 1974), the court applied the "discovery" provision of §203(f) to bar an action to rescind a transaction. There, the statute which would normally have been applied was N.Y.C.P.L.R. §213(1), for actions where no limitation is specifically prescribed by law. In Slagen v. Marwill, 78 Misc. 2d 275 (Sup. Ct., Saratoga Co. 1974), the court applied §203(f) to bar an action for medical malpractice commenced more than two years after discovery, despite the absence of any statute requiring the limitations period to be measured from discovery. In reaching that result, the court relied on Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427 (1969), which ruled that the three year malpractice statute of limitations was tolled until discovery.*

Thus, Judge Pratt was clearly correct in ruling that, as a matter of New York law, §203(f) was applicable to a case such as this, where the statute of limitations runs from "discovery."

Section 203(f) Is Applicable
To Federal Civil Rights Actions

Since §203(f) is of general applicability, plaintiffs' use of the fraudulent concealment doctrine triggers the application of §203(f), which applies where limitations periods are keyed to the "discovery" of facts. There is no question that a

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* Subsequent to these decisions, the New York Legislature enacted C.P.L.R. §214-a, which provides that in "foreign object" malpractice cases, the statute of limitations is one year from the date of discovery.

federal court, when called upon to apply a state statute of limitations to a federal claim, should apply the entire state statute of limitations, including §203(f).*

In Rickel v. Levy, 370 F. Supp. 751, 756 (E.D.N.Y. 1974), for example, Judge Bartels applied §203(f) to a federal securities action commenced on June 24, 1971, some eleven years after accrual of the claim. Ordinarily, the applicable statute of limitations for securities act claims brought in New York is the six year New York fraud statute. However, since that statute had expired, plaintiff claimed that "the statute is tolled under the federal equitable tolling doctrine which tolls the running of the statute during periods in which there is fraudulent concealment . . . ." Applying the two-year discovery limitation of §203(f), the court found that "plaintiff could have discovered the acts of fraud prior to June 24, 1969," and, therefore "the doctrine proves to be of no additional help." Thus, the Rickel court declined to afford to the plaintiff the entire six-year fraud limitations period commencing with discovery, and stated that at most, §203(f) would have been applied

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* See Hoff Research & Development Laboratories, Inc. v. Philippine National Bank, 426 F.2d 1023, 1026 (2d Cir. 1970):

> "[T]he draftsmen of the CPLR concluded that delayed discovery of a previously-accrued cause of action constituted a unique situation in which especially prompt action by a litigant is necessary in the interest of fairness. CPLR §203(f) accordingly shortened all periods triggered by discovery to two years . . . ."

See also Klein v. Shields & Co., 470 F.2d 1344 (2d Cir. 1972), applying §203(f) in a federal action brought under the securities laws.

to give plaintiff two additional years to commence his action.

Plaintiffs' only response is to assert the truism that the federal concealment doctrine must be applied uniformly. According to plaintiffs, application of §203(f) would interfere with this uniformity. This argument does not withstand analysis.

Defendants do not quarrel with the need for uniform application of the concealment doctrine. It is well settled that a diligent federal plaintiff is entitled to the benefit of the doctrine where the defendant has actively concealed from him the existence of his cause of action. But the doctrine only provides to its beneficiaries the opportunity to commence an otherwise time-barred action within the period of the applicable state statute of limitations, measured from the time of discovery. The applicable state statute of limitations in New York, where "discovery" is an element in computing the limitations period, is §203(f).

Plaintiffs' argument with respect to uniformity in the application of the concealment doctrine is, in reality, a plea for the application of a uniform three-year statute of limitations for civil rights actions. Invoking the fraudulent concealment doctrine, plaintiffs seek to have this Court ignore the strong state policy embodied in New York's statute of limitations in favor of a supposed need for a uniform statute of limitations in civil rights actions which neither exists in fact, nor is required as a matter of policy.

Application of the §203(f) two-year limitations period does not interfere in any way with the policy of the Civil Rights Act. Congress never intended that one limitations period would apply to all such actions regardless of the district in which the action is commenced. As this Court stated in Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 84 (2d Cir.), cert. denied, 368 U.S. 821 (1961):

> "Plainly Congress did not deem complete nationwide uniformity of limitation essential in [cases where the federal courts borrow state statutes], else it would have provided its own period . . . ."

Indeed, no uniformity was intended -- and none has resulted.

For example, in many circuits the courts will determine the applicable civil rights statute of limitations by analogizing the underlying conduct to a state-law tort, and then applying the state time period applied for that particular tort. See generally Reed v. Hutto, 486 F.2d 534, 537 n.2 (8th Cir. 1973). Thus, this very action, which basically sounds in malicious prosecution, would have been subject to a two-year statute of limitations had it been brought in Pennsylvania,* Michigan,** or Illinois***, or a one-year statute if it

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* See Hilema: v. Knable, 391 F.2d 596 (3d Cir. 1968).

** See Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968).

*** See Jones v. Jones, 410 F.2d 365 (7th Cir.), cert. denied 396 U.S. 1013 (1970).

had been commenced in Tennessee.*

Moreover, by not providing for a uniform limitations period for a federally created claim, Congress decided that the policies underlying a state's statute of limitations should be enforced. As the Supreme Court has said:

> "[T]he length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests prohibiting the prosecution of stale ones.
>
> * * *
>
> In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975).

Thus, unless the application of the state statute of limitations substantially interferes with substantive federal rights at issue, the federal court, as Johnson makes clear, must uphold the state's policy embodied in its limitations provisions.** See also Meyer v. Frank, 550 F.2d 726, 729 (2d Cir. 1977).

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* See Tenn. Code Ann. 28-304 (Cum. Supp. 1976). Tennessee has enacted a statute of limitations setting one year as the period for the commencement of any actions "under the federal civil rights statutes".

** Those provisions are of such great public importance that the courts have imposed a particularly heavy burden on a party seeking to escape the operation of a statute of limitations:

[Footnote continued on next page]

N.Y.C.P.L.R. §203(f) embodies the traditional policies of protecting defendants by preventing surprise from revival of claims after evidence has been lost, see Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944), and protecting courts from having to decide stale claims, see Burnett v. New York Central R.R., 380 U.S. 424, 428 (1965). However, it is intended to promote one further policy:

> "The philosophy behind this statute is simple: a plaintiff whose statute of limitations has been tolled until he discovers the cause of action, and who discovers the cause of action long after it has accrued, should not have the same length of time in which to sue as a plaintiff who discovers his cause of action promptly . . . . " McKinney's Consolidated Laws of New York, Book 7B at 125-26.

See also Hoff Research & Development Laboratories, Inc. v. Philippine National Bank, supra. This policy should be respected.

Application of §203(f) to plaintiffs' claim does no violence either to the uniform application of the federal fraudulent concealment doctrine -- which still applies to afford a diligent plaintiff whose cause of action has been fraudulently

[Footnote continued from previous page]

> "Since the [doctrines of concealment and estoppel] are in avoidance of the statute of limitations, the party seeking the benefit of them has the burden of proof to establish them. All presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions." Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 233 (6th Cir.), cert. denied, 419 U.S. 997 (1974).

concealed the opportunity to bring his lawsuit -- or to the policy of the federal Civil Rights Act -- which has long countenanced differing statutes of limitations in different jurisdictions. Only by applying §203(f), however, can the federal policy of "relying on the State's wisdom" in matters of limitations periods, and the New York State policy reflected in its statute, be vindicated.

A federal court hearing a claim brought under 42 U.S.C. §1983 must apply the applicable state statute of limitations. There is no reason why the entire New York statute of limitations scheme, including N.Y.C.P.L.R. §203(f), does not come within this rule. Plaintiffs cannot selectively borrow those portions of the New York statute that advance their cause. Therefore, even if the federal concealment doctrine is applicable, plaintiffs' claims are time-barred.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN

Attorneys for Defendants-Appellees
Avis Rent-A-Car System, Inc.,
Salvatore Giuffreda, Bernard
Nelson, Charles Napolitano, and
Stuart B. Stillman

Of Counsel:

Michael A. Cardozo
Stephen E. Tisman
Minna J. Kotkin

June 30, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Steven M. Freeman being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age and reside at

19 Gainsboro Lane, Syosset, New York

On June 30, 1977 , I served the attached

Brief for Defendants-Appellees

upon the following attorney(s) at the address designated by him (them) for that purpose:

Arlene R. Silverman, Esq.
Assistant Attorney General
Two World Trade Center
New York, New York 10047

Elihu Inselbuch, Esq.
Gilbert, Segall & Young
430 Park Avenue
New York, New York 10022

Spiros A. Tsimbinos, Esq.
125-10 Queens Boulevard
Kew Gardens, New York 11415

Said service was made by depositing 2 true copies of the attached

Brief for Defendants-Appellees

enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York

Steven M. Freeman

Steven M. Freeman

Sworn to before me this

30th day of June 1977

Notary Public

VITOLD J. de STRONIE
Notary Public, State of New York
No. 41-4517529
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1978

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